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Irving Ready-Mix, Inc. and Chauffeurs, Teamsters & Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters. Cases 25–CA–31485, 25–CA–31490, and 25–CA–31548

October 31, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On December 17, 2010, Administrative Law Judge Paul Bogas issued the attached decision.¹ The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Union filed answering briefs, and the Respondent filed reply briefs. The Acting General Counsel also filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions² and to adopt the recommended Order as modified.³

¹ Since January 28, 2011, there has been in place an injunction under Sec. 10(j) of the Act requiring the Respondent to recognize and bargain with the Union and to restore the unit's preexisting terms of employment. *NLRB v. Irving Ready-Mix, Inc.*, 780 F.Supp.2d 747 (N.D. Ind. 2011), aff'd. 653 F.3d 566 (7th Cir. 2011).

² The Acting General Counsel excepts to the judge's finding that it was unnecessary to decide whether the employees' 2010 strike was or became an unfair labor practice strike rather than an economic strike. We agree with the judge. The benefit to the strikers of the Acting General Counsel's proposed finding would be protection against permanent replacement. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). But here the Respondent had not permanently replaced the strikers; indeed, it immediately accepted their unconditional offer to return to work. The Acting General Counsel nevertheless suggests that, absent a finding that the employees were unfair labor practice strikers, the Respondent will be free to threaten or take unspecified action against them, citing *Allied Mechanical Services*, 332 NLRB 1600 (2001). On the contrary, an employer is not free to retaliate against or penalize employees for having engaged in a protected economic strike. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346 (1938); *Laidlaw Corp.*, 171 NLRB 1366, 1368–1369 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Nothing in *Allied Mechanical Services* is to the contrary.

³ As discussed below, we are affirming the judge's findings that the Respondent unlawfully withdrew recognition of and refused to bargain with the Union. Because the parties' last known contract has expired, and the record does not indicate that the Respondent has since bargained with the Union, we will add an affirmative bargaining requirement to the judge's recommended Order.

The Respondent will be required to reimburse unit employees, with interest compounded daily, for any expenses ensuing from its unlawful failure to make required payments to employees' retirement fund, as set

The judge found that the Respondent, a supplier of ready-mix concrete, was not a construction industry employer within the meaning of Section 8(f) of the Act, and that it violated Section 8(a)(5) and (1) by withdrawing recognition of the Union upon the expiration of the parties' collective-bargaining agreement, refusing to bargain with the Union, unilaterally changing unit employees' terms and conditions of employment, and dealing directly with those employees. We affirm those findings, and write here only to briefly address one of the Respondent's arguments on exceptions.

With respect to the Respondent's status under Section 8(f), the judge found, and we agree, that this case falls squarely under *J. P. Sturris*, 288 NLRB 668 (1988), where the Board found that a similar ready-mix concrete supplier was not a construction industry employer within the meaning of that section. We reject the Respondent's argument that *J. P. Sturris* was wrongly decided because the judge's decision there cites two cases addressing whether employers fell within the construction industry proviso to Section 8(e) of the Act, dealing with so-called "hot-cargo agreements": *Joint Council of Teamsters No. 42 (Inland Concrete Enterprises)*, 225 NLRB 209 (1976), and *Teamsters Local 294 (Island Dock Lumber)*, 145 NLRB 484 (1983), enf'd. 342 F.2d 18 (2d Cir. 1965).⁴

Although the judge's decision in *J. P. Sturris* could be read to suggest that *Inland Concrete* and *Island Dock Lumber* concerned both Sections 8(e) and 8(f), see 288 NLRB at 671, the Board's own analysis clearly focused on the employer's status under Section 8(f). See *id.* at

forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. mem. 661 F.2d 940 (9th Cir. 1981). To the extent that an employee has made personal contributions to the fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

We will, however, delete the recommended Order's reference to compound interest on payments to the fund because, as the judge's remedy properly provides, "any additional payments" owed to the fund are calculated under *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

The Acting General Counsel, citing the Respondent's unlawful direct dealing with unit employees, requests that we modify the judge's recommended Order by requiring the Respondent to rescind its June 1 and June 14, 2010 letters to employees altering their terms and conditions of employment. We find it unnecessary to make this modification because the nullification of those letters is effectuated by the existing cease-and-desist provisions in the Order.

⁴ Sec. 8(e) generally prohibits unions and employers from entering into any agreement in which the employer agrees to refrain from dealing in the products of another employer or to cease doing business with another person. There is a specific proviso, however, exempting such agreements "in the construction industry" relating to work to be done at the construction site.

668. In any event, *Inland Concrete* and *Island Dock Lumber* support the finding in *J. P. Sturrus* that the employer there was not covered by Section 8(f). In both of those cases, the Board found that a supplier of ready-mix concrete was not an employer “in the construction industry” under the proviso to Section 8(e). Those findings are significant because Section 8(e) is broader in scope than Section 8(f), which more narrowly covers employers “engaged primarily in the building and construction industry” (emphasis added).⁵ Thus, insofar as *Inland Concrete* and *Island Dock Lumber* held that a ready-mix concrete supplier did not satisfy even the Section 8(e) proviso, they support the finding in *J. P. Sturrus* that a ready-mix supplier did not come within the more restrictive scope of Section 8(f).

Accordingly, we affirm the judge’s application of *J. P. Sturrus* and his finding that the Respondent was not a Section 8(f) employer.⁶

AMENDED REMEDY

As noted, we have decided to add an affirmative bargaining requirement to the judge’s recommended Order. For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent’s unlawful withdrawal of recognition. We adhere to the view that an affirmative bargaining order is “the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.” *Id.* at 68. In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plas-*

tics v. NLRB, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra, the court summarized its requirement that an affirmative bargaining order “must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees’ Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.” *Id.* at 738. Although we respectfully disagree with the court’s requirement, for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case and find that a balancing of the three factors warrants an affirmative bargaining order.⁷

(A) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent’s withdrawal of recognition, refusal to continue bargaining with the Union, unilateral action, and direct dealing with employees. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union’s continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violations. To the extent such opposition may exist, moreover, it may be at least in part the product of the Respondent’s unfair labor practices.

(B) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent’s incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent’s withdrawal of recognition to achieve immediate results at the bargaining table following the Board’s resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(C) Finally, a cease-and-desist order, alone, would be inadequate to remedy the Respondent’s refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining

⁵ See *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714, 715–716 (1995); see also *Los Angeles Building and Construction Trades Council (Church’s Fried Chicken)*, 183 NLRB 1032, 1036–1037 (1970) (employer engaged primarily in selling fried chicken was nonetheless an employer “in the construction industry” under Sec. 8(e) with respect to the construction of its retail stores).

⁶ We agree with the judge that *J. P. Sturrus* was not overruled by either *Techno Construction Corp.*, 333 NLRB 75 (2001), or *Bell Energy Management Corp.*, 291 NLRB 168 (1988). However, we do not rely on the judge’s citation to *Mastronardi Mason Materials*, 336 NLRB 1296, 1296 fn. 1 (2001), *enfd.* 64 Fed Appx. 271 (2d Cir. 2003), where the 8(f) versus 9(a) issue was not presented to the Board, or his citation to *Engineered Steel Concepts*, 352 NLRB 589, 602 (2008), a case decided by the two-member Board. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

Member Hayes agrees with his colleagues and the judge that the Respondent was not an employer engaged in the building and construction industry for purposes of Sec. 8(f). However, he finds that the issue of a ready-mix concrete supplier’s coverage under 8(f) remains subject to a case-by-case examination of particular facts relevant to that employer’s activities.

⁷ Member Hayes agrees with the D.C. Circuit that a case-by-case analysis is required to determine if an affirmative bargaining order is appropriate. He finds that imposing a bargaining order here is appropriate under that analysis.

agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby undermining employee support for continued union representation. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who might oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Irving Ready-Mix, Inc. of Fort Wayne and Kendallville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a), and reletter the following paragraphs accordingly.

"Upon request, recognize and bargain collectively with the Union as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document."

2. Substitute the following for relettered paragraph 2(d).

"Make all contributions, including any additional amounts due, that it was required to make to the employees' retirement fund, but which it has not made since January 26, 2010, and reimburse unit employees, with interest as provided in the remedy section of the judge's decision as modified in this decision, for any expenses resulting from its failure to make the required payments."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 31, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain in good faith with the Chauffeurs, Teamsters & Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters (the Union) as the exclusive Section 9 collective-bargaining representative of our employees in the bargaining unit comprised of all full-time and part-time ready-mix drivers employed at our facilities in Fort Wayne, Indiana, and Kendallville, Indiana.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT unilaterally change unit employees' terms and conditions of employment without giving the Union notice and an opportunity to bargain over those changes.

WE WILL NOT bypass the Union and deal directly with unit employees regarding terms and conditions of employment.

WE WILL NOT announce to employees that we no longer recognize the Union as the collective-bargaining representative of unit employees and/or that we are changing unit employees' terms and conditions of employment without first notifying, and bargaining in good faith with, the Union.

WE WILL NOT interrogate applicants for bargaining unit positions about their willingness to work in the event of a strike by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, recognize and bargain collectively with the Union as your exclusive representative with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document.

WE WILL restore, honor, and continue the terms and conditions set forth in the contract with the Union that was effective by its terms from June 1, 2005, through May 31, 2010, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL make whole the unit employees and former unit employees for any and all loss of wages, overtime pay, and other benefits incurred as a result of our unlawful unilateral changes, with interest.

WE WILL make all contributions, including any additional amounts due, that we were required to make, but did not make since January 26, 2010, to the unit employees' retirement fund, and WE WILL reimburse unit employees, with interest, for any expenses ensuing from our failure to make the required payments.

IRVING READY-MIX, INC.

Belinda J. Brown, Esq. and Frederic R. Roberson, Esq. for the General Counsel.

Scott Hall, Esq. (Hall & Gooden), of Fort Wayne, Indiana, for the Respondent.

Geoffrey S. Lohman, Esq. (Fillenwarth, Dennerline, Groth & Towe), of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Fort Wayne, Indiana, on September 29 and 30, 2010. Chauffeurs, Teamsters & Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters (the Union) filed the charge in case 25-CA-31485 on June 2, 2010, the charge in case 25-CA-31490 on June 4, 2010, and the charge in case 25-CA-31548 on July 26, 2010. On July 21, 2010, the Union filed the amended charge in case 25-CA-31490. The Regional Director of Region 25 of the National Labor Relations Board (the NLRB or the Board) issued the order consolidating cases, consolidated complaint and notice of hearing (the complaint) on August 26, 2010. The complaint alleges that Irving Ready-Mix, Inc. (the Respondent or the Company) failed to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, inter alia, engaging in bargaining tactics in furtherance of a plan to remove the Union and replace the bargaining unit employees, withdrawing recognition from the Union as the exclusive collective-bargaining representative of unit employees, and unilaterally reducing employees wage rates and benefits. The complaint also alleges that the Respondent violated Section 8(a)(1) by, inter alia, announcing to an applicant for employment that the Company planned to remove the Union and quickly replace the bargaining unit employees, and by telling employees that it was withdrawing recognition from the Union and changing the terms and conditions of employment of unit employees. The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations of the Act. The Re-

spondent argues, inter alia, that its obligation to recognize, and bargain with, the Union ceased when the collective-bargaining agreement reached its expiration date because the Company is an employer in the building and construction industry whose bargaining relationship with the Union is governed by Section 8(f), not Section 9, of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, delivers ready-mix concrete from its facilities in Fort Wayne, Indiana, and Kendallville, Indiana, where it annually sells and ships goods valued in excess of \$50,000 directly to points outside the State of Indiana, purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Indiana, and derives gross revenues in excess of \$500,000. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent has a total of four locations at which it produces and loads ready-mix concrete for sale and delivery to customers. Ready-mix concrete (ready-mix) is a mixture of cement, stone, sand, and various additives. The particular mixture that the Respondent prepares varies based on the customer's specifications. The Respondent uses its own employee-drivers to deliver wet ready-mix to the customers' jobsites. The Respondent also sells and delivers a number of other items that customers use in conjunction with ready-mix, including wire mesh, re-bar, expansion joints, tiles, sealers, and curing compounds. Tom Irving (T. Irving) is the Respondent's president, Jerry Irving (J. Irving), is its vice president, and Judy McKeever (J. McKeever) is its secretary-treasurer. Those three individuals are equal-part owners of the Respondent. Derek Ray is the Respondent's general manager and has responsibility for the day-to-day operation of its facilities, but is generally not involved with the financial aspects of the business.

The employees who drive the Respondent's ready-mix trucks have been represented by the Union for a period beginning in the 1970s and continuing at least through May 31, 2010. At the time relevant to this litigation there were approximately 23 such drivers. As of 2010, the Union and the Respondent had been parties to four consecutive collective-bargaining agreements—each of 5 years' duration—without any time lapses between those contracts. There is no evidence that the Union's representative status has ever been set forth in a certification issued by the Board. George Gerdes is the Union's president and was on the Union's negotiating team for the last four contracts and also during unsuccessful negotiations for a new contract in May 2010. He is an employee of the Union.

The most recent collective bargaining agreement between the Union and the Respondent was effective by its terms from June 1, 2005, to May 31, 2010, and applied to the Respondent's full-time and part-time ready-mix drivers. Under that contract, the unit employees, *inter alia*, were paid \$20.82 per hour, received overtime pay for work in excess of 8 hours in a day or performed before 6 a.m. or after 5 p.m., had 8 paid holidays, and earned between 7 and 18 days of paid vacation annually. The contract also provided that the Respondent would contribute \$75 per week to the employees' retirement fund for each unit employee who worked during that week.

In May 2010, the Union and the Respondent engaged in negotiations for a successor contract, but the parties did not reach a new agreement. On June 1, 2010—the day after the last contract's expiration date—the Respondent ceased to recognize the Union and announced to employees that it was unilaterally implementing new terms and conditions of employment for its ready-mix truck drivers.

B. Work of the Ready-Mix Truckdrivers.

As is discussed in the analysis section of this decision, the Board has held that ready-mix concrete delivery companies and their drivers are not engaged in the building and construction industry within the meaning of Section 8(f), and that unions who have bargaining relationships with such companies are therefore Section 9 representatives, not limited Section 8(f) representatives. *J. P. Sturris Corp.*, 288 NLRB 668, 671–672 (1988); see also *Mastronardi Mason Material Co.*, 336 NLRB 1296, 1306 (2001), *enf. 64 Fed. Appx. 271* (2d Cir. 2003). The Respondent contends that the Board decided *Sturris* erroneously, and that consideration of the duties of the Company's ready-mix drivers should lead me to conclude that those employees are engaged in the building and construction industry for purposes of Section 8(f). The basic facts relative to this issue are discussed below.

The type of work performed by the Respondent's ready-mix drivers does not differ from that performed by ready-mix drivers generally. This is established by the record as a whole, and is supported even by the testimony of the Respondent's own witnesses. See Transcript at page(s) (Tr.) 234 (G. Miller testifies that there was no "difference" between the duties performed by the Respondent's ready-mix drivers and those performed by drivers from the other ready-mix companies) and Tr. 294 (S. Byler testifies that the Respondent's ready-mix drivers do not do anything that other ready-mix drivers do not do). The primary duties of the Respondent's ready-mix drivers are: picking up the load of wet ready-mix at one of the Respondent's facilities; driving the truck carrying the ready-mix to the customer's job site; unfolding the chutes on the truck; discharging the wet ready-mix cement down the chutes and into whatever space or spaces the customer directs; washing the truck after the ready-mix has been discharged; and then driving back to the Respondent's facility. Typically the customer has the driver discharge the ready mix into a form or mold that the customer has constructed for the purpose of fabricating a concrete wall, driveway, building foundation, or other item. In some instances, the customer has a driver discharge the ready-mix into a bucket or other receptacle that the customer itself

then uses to move the concrete to the location at the jobsite where it is needed. Wet ready-mix cannot be warehoused by the customer because it begins to permanently harden as soon as it is leaves the truck. In order to place the ready-mix throughout the space selected by the customer, the driver is typically required to control the rate at which the ready-mix flows and to move the chute and/or the truck itself while discharging the mixture. The driver is also sometimes required to interrupt the discharge of the ready-mix so that the customer can perform necessary work or the driver can move the truck to a different location at the jobsite. Sometimes, the location where the ready-mix is to be poured cannot be reached using the regular chutes and for this reason the trucks carry extension chutes that the driver may be required to attach.

In most instances the driver will remain inside the truck during the entire time that the ready-mix is being discharged and will only exit when it is time to wash the truck. He or she uses controls inside the truck to determine the rate at which the ready-mix is discharged and the movement of the chute. On rare occasions, the driver finds it advantageous to observe the discharge process from outside the truck, and in those instances he or she can use a set of controls on the exterior of the truck to control the rate of discharge and movement of the chute. The ready-mix truck also carries a supply of water, and there are controls inside the truck that allow the driver to add this water to the ready-mix when either the truck's meter, or the customer, indicate that the ready-mix is not wet enough. The addition of this water cannot be accomplished from outside the truck. In addition to delivering the ready-mix itself, the driver sometimes delivers related items sold by the Respondent such as wire mesh or re-bar. Immediately after discharging the concrete, the driver usually washes the truck at the customer's jobsite to keep any ready-mix from hardening on it. Then the driver returns the truck to the Respondent's facility.

After the ready-mix is discharged from the truck, the customers' own employees use various tools to move the ready-mix within the form, spread it evenly, smooth it out, and otherwise "finish" the concrete. It is not the job of the ready-mix driver to perform or assist with any of these activities. The ready-mix driver will generally be washing the truck or driving back to the ready-mix facility while these finishing activities are performed by the customer's employees. In rare instances, ready-mix drivers, including those employed by the Respondent, will voluntarily assist a customer with some aspect of the finishing process. However, the customer does not pay the Respondent for this assistance and the ready-mix driver is not required to render it. Similarly, a ready-mix driver will on rare occasions voluntarily assist a customer by using the truck's hose to rinse off the customer's tools.

The Respondent's ready-mix drivers spend approximately 34 to 39 percent of their worktime at the Respondent's facilities waiting for a load, wiping down the truck, or helping around the plant, 6 percent of their work time receiving ready-mix loads with the trucks, 25 percent of their work time driving to and from the customers' jobsites, and 30 to 35 percent of their work time at the customers' jobsites. Of the time that drivers spend at customers' jobsites, approximately 70 percent is used to discharge the ready-mix, and approximately 30 percent is

used to wash the truck.

The jobsites to which the ready-mix drivers deliver are outdoors approximately 98 percent of the time and, as a result, the drivers' work is subject to weather conditions. If it is raining, or if the temperature is below freezing, the Respondent generally cannot deliver ready-mix and the drivers are unable to work. The drivers usually work steadily during the summer, but do not have much work in January, February, and March.

Each of the Respondent's ready-mix drivers is required to have a Class B commercial driver's license (CDL). At regular intervals the driver is required to take and pass a physical examination in order to retain the CDL. The evidence shows that most of the Respondent's drivers are long-time employees of the Company.¹ Under the last contract between the Union and the Respondent, layoff and recall decisions generally depend on employee seniority and laid-off workers who have accumulated at least a year of seniority retain their health insurance benefits for a period of time. The last contract requires that new employees become members in good standing of the Union "on or after the thirtieth (30th) day following the beginning of [their] employment."

C. The Respondent's Financial Circumstances During the Period Leading up to Contract Negotiations and the Cessation of Retirement Fund Contributions

The Respondent's last profitable fiscal year was the one ending in September 2005. At that time, the Respondent possessed cash reserves of between \$2.5 and \$3 million. Those cash reserves were exhausted by some point in 2009, but the Respondent continued to operate using a line of credit from a bank and cash infusions from its owners. The Respondent's total sales have declined from \$9,790,599.35 in fiscal 2008, to \$6,277,361.00 in fiscal year 2009, and \$5,759,185.77 in fiscal year 2010. In December 2009, the bank that was providing the line of credit told the Respondent that it was terminating the arrangement, but agreed to extend the credit through July or August 2010. The Respondent has attempted to find another bank willing to provide it with credit, but at the time of trial had not succeeded in doing so.

Since 2008, the Respondent has not made the retirement fund contributions required by its last contract with the Union. Pursuant to that contract, the Respondent was responsible for contributing \$75 per week for each unit employee who worked during that week. On December 4, 2009, the Respondent provided the Union with a report showing that, in 2008, the Company had failed to make required contributions totaling \$99,225. A second report, provided to the Union on January 10, 2010, showed that the Company had failed to make required contributions of \$70,200 in 2009.

On March 31, 2010, the Respondent and the Union met to discuss the Company's failure to make the retirement fund contributions. This was about 6 weeks before the Respondent and the Union began negotiations for a contract to replace the one that was expiring after May 31, 2010. Present at the March

¹ Gene Miller had been a driver with the Respondent for over eight years at the time of trial and was still near the bottom of the seniority list. David Garn has been a driver with the Respondent for 32 years.

31 meeting for the Respondent were T. Irving and the Respondent's operations manager, Mark McKeever (M. McKeever). Present for the Union were Gerdes and David Garn, a truck driver who has been employed by the Respondent for 32 years. Also present were two of the Respondent's financial advisors who were familiar with the retirement fund. The Respondent stated that it did not have the cash to make the retirement fund payments. It also stated that the bank would not loan the Respondent any money for cash flow expenditures such as the retirement fund contributions and was insisting that the Respondent refrain from making payments to the fund. The Respondent also stated that it had a plan to make the back contributions, but was waiting for the Internal Revenue Service (IRS) to approve the plan.

At the March meeting, Gerdes asked what would happen regarding the unpaid retirement fund contributions if the Respondent filed for bankruptcy. Gerdes' understanding was that, in bankruptcy, the unpaid contributions would be one of the "top secured debts". Gerdes also asked for assurances that the Respondent was not asking the IRS for a waiver of the obligation to make the unpaid retirement fund contributions. The Respondent's officials stated that the Company was not seeking such a waiver.

D. Contract Negotiations in 2010

The Union, by letter dated March 4, 2010, notified the Respondent that the collective-bargaining agreement was scheduled to terminate on May 31, 2010, and offered to meet and confer for the purpose of negotiating a new contract. Gerdes followed this up with an April 27, 2010, letter asking that M. McKeever (operations manager) contact the Union as soon as possible to schedule negotiations and advising that Gerdes would not be able to meet on May 25, 26, and 27. The letter also asked the Respondent to make ready-mix drivers Tom Bryan, Andy Fisher, and Garn available to participate in the negotiations. The Respondent did not answer Gerdes' letters until approximately May 10, when attorney Scott Hall, who the Company had hired in December 2009 to handle the 2010 negotiations, contacted Gerdes by phone. The parties subsequently met to negotiate on three occasions in May.

May 17 Session

The parties' first negotiating session was on May 17 at the Union's offices. The negotiators for the Union were Gerdes, Bryan, Fisher, and Garn. The Respondent's negotiating team consisted of Ray, Hall, and M. McKeever. As stated above, Ray had limited involvement with the Company's finances and, although he was aware in general terms that the Company was in financial distress, the owners did not disclose the extent of that distress to him prior to the start of negotiations. Hall and M. McKeever were not called to testify, and the record does not reveal how much they knew about the Respondent's financial problems.

At the May 17 session, the Union presented a comprehensive written bargaining proposal, but the Respondent did not present any proposals. The Union's proposal included: a 60-cent-per hour wage increase for each year of the contract; a 3-year con-

tract term; a requirement that the Respondent provide 28-days' notice of the Union contract to potential buyers or transferees—up from 20-days' notice in the last contract; an increase in the paycheck deduction for an employee's union initiation fee from \$20 to \$50 per week until the fee is paid; the deletion of contract language limiting the Union's use of informational picketing; the elimination of a requirement that union representatives who visit the Respondent's facility advise management of their presence and of the identity of any employees being visited; a change in the amount of annual vacation for an employee with 5 years of service from 2 weeks to 12 days; an increase in the minimum number of hours of pay to be received by employees who the Respondent orders to report to work on a Monday; a decrease in the allowable complement of part-time drivers from 25 percent of the number of ready-mix trucks to 10 percent of the number of ready-mix trucks; and, an increase in the number of weeks that the Respondent would be required to continue the health insurance of unit employees during a period of layoff.

The parties did not reach agreement on any element of the Union's May 17 proposal. The next bargaining session was scheduled for May 19.

May 19 Session

The Respondents met on May 19 at the Union's offices. As at the last bargaining session, Gerdes, Bryan, Fisher, and Garn, were present for the Union, and Ray, Hall, and M. McKeever were present for the Respondent. This time the Respondent presented a written bargaining proposal. That proposal sought significant reductions in employees' benefits and entitlement to overtime pay, but did not include a general wage proposal. The Respondent also presented employees with plan documents for health insurance options that the Company provided to nonunit employees and to which the Respondent was proposing to switch the unit employees. Ray helped prepare this proposal. J. McKeever had been working on developing employer proposals for several weeks prior to this, but was unable to say who exactly put together the particular proposal that was presented on May 19. J. McKeever stated that prior to May 19, she had not had a meeting with the other owners and the negotiating team to discuss what the Respondent should offer the employees. J. McKeever did not explain why such a meeting had not taken place given that the Respondent was aware for at least 5 months that negotiations were approaching and had retained attorney Hall in December 2009 to assist with those negotiations. As of May 19, the Respondent's owners had not yet fully apprised Ray of the extent of the Respondent's financial difficulties.

The Respondent's May 19 proposal included: deletion of the entire contract article regarding seniority and employee entitlements based on seniority; an increase in the number of hours that an employee had to work in order to qualify for full vacation benefits; deletion of the policy of paying employees for unused vacation time and substituting a policy under which employees would forfeit vacation time not used by the end of the year; limitation of overtime pay to hours worked in excess of 40 hours per week, and discontinuation of the policy of paying overtime rate for time worked in excess of 8 hours on a

particular day and for any time worked before 6 am or after 5 pm; elimination of the requirement that the Respondent notify employees of mandatory start times by 8:30 am on the day in question, and instead allowing the Respondent to wait until 9:30 am to notify employees; reduction in the minimum number of hours of pay provided to employees the Respondent orders to report to work on workdays from Tuesday to Friday; elimination of both the employees' entitlement to pay for time spent taking physical examinations required to maintain their CDLs, and to employer-reimbursement of the cost of those examinations; reduction of the Respondent's contributions to the employee retirement fund from a guaranteed \$75 per employee/per week, to \$1.50 for each straight time hour worked per employee/per week (for a total of \$1.50 to \$60 per employee/per week); replacement of the existing health and welfare plan with the plans that the Respondent offered to nonunit employees; elimination of the unit employees' entitlement to continue receiving health insurance during weeks when they are on lay-off status or work less than 4 hours during the week; elimination of the contract section requiring that, in the event of a transfer of ownership, the new owners be required to abide by the contract; elimination of a contract section requiring the Respondent to give new owners advance notice of the Union contract; substitution of mandatory strike notice by telegram/wire with notice by current communication methods; and modification of the substance abuse policy to harmonize it with current governmental standards.

At the May 19 session, the Respondent told the Union that the Company needed to reduce costs. It presented the Union with documents showing declines in the Company's sales of ready-mix, and in the numbers of hours being worked by its ready-mix drivers. The information presented showed, *inter alia*, that the Respondent's production of ready mix had declined from 160,444.25 cubic yards in 2003 to 71,821.50 cubic yards in 2009. However, the Respondent did not state, either on May 19 or later, that its proposed reductions in benefits were based on an inability to pay. At the session, Gerdes mentioned that he had heard the Respondent was having trouble with the bank.

The Union offered to make the health insurance plan under the Teamsters welfare fund available to the Respondent. Participation in that plan was offered as a way to help the Respondent reduce its costs. The Respondent's costs under the Teamsters' welfare fund plan would be lower than those for the health insurance provided under the current contract, but greater than those under the plans that the Respondent had proposed. The Union stated, either at this session or one of the other two, that it wanted the Respondent to make its 2008 retirement fund contributions by June 30, 2010, and its 2009 contributions a month later.

At this meeting, the parties reached agreement on a contract duration of 3 years, on updating the substance abuse policy, and on replacing wire/telegram strike notification with notification by facsimile.

During the meeting, Gerdes asked Ray "what is your number?" Ray apparently understood Gerdes to be asking the Respondent to state the maximum average hourly cost that management would agree to incur in wages and benefits for a unit

employee. Ray did not provide Gerdes with the Respondent's "number" at the May 19 meeting. The parties scheduled their next bargaining session for May 24, 2010.

Respondent Cancels May 24 Meeting,
Ray Meets with Owners on May 25 and
Prepares for Possible Strike

A few hours before the May 24 negotiating session was scheduled to begin, Hall called Gerdes to cancel that session. Hall told Gerdes that the Respondent did not have its offers ready, and that the offers it did have would anger Gerdes. Hall suggested that the parties reschedule the session for Friday, May 28—3 days before the current contract was set to expire.² The parties agreed to meet on May 28.

On May 25, Ray met with the Respondent's owners—T. Irving, J. Irving, and J. McKeever. Ray set up this meeting in part to seek an answer to Gerdes' question about the Respondent's "number." Prior to when Gerdes posed that question, Ray had not tried to calculate a specific amount of labor cost savings that the Respondent would demand in the new contract. Ray concluded, based on information he received from J. McKeever, that the Respondent's average hourly labor cost, after one took into account benefits as well as wages, was \$43 per unit employee. The participants at the May 25 meeting decided that they wanted to decrease that figure to \$31 or \$32—a reduction of \$12 or \$11. At the May 25 meeting, Ray and the Respondent's owners developed two alternative proposals, each of which brought the average per hour labor costs for unit drivers close to the \$31 figure. Both of these proposals included significant additional cuts beyond those the Respondent had proposed on May 19. The Respondent referred to these new options as proposal A and proposal B.

The participants at the May 25 meeting also discussed preparation for a possible strike by unit employees. The written agenda for the meeting indicates that the preparations discussed included hiring drivers, notifying customers, and prioritizing deliveries. Ray did, in fact, begin interviewing applicants for bargaining-unit positions in late May. One of the applicants that Ray interviewed was Greg Walker. Walker drove semi-trailers for another employer, but also had experience driving ready-mix trucks as a member of the Union. Walker testified that he asked Ray whether the position was full-time and that Ray responded, "Well, we are trying to boot the Union out, and we are looking to see how fast we can replace our drivers." Walker testified that he decided not to pursue employment with the Respondent because he was unwilling to cross a picket line. Walker did not know Ray prior to applying for work with the Respondent. Ray denied making the comment reported by Walker. According to Ray's testimony, what he told Walker and other prospective replacement drivers was that the Company was "in the midst of negotiations" with the Union and did not "know which way it is going to go, whether we are going to

have a ratified contract, or we are going to end up with a strike." Ray testified that he asked prospective ready-mix drivers whether they would be willing to drive for the Respondent during a strike by the incumbent unit employees.

Based on my consideration of the demeanor of the witnesses and the record as a whole, I find that Ray's account of the statements he made to Walker and other applicants was more credible than the account given by Walker. In reaching this conclusion, I considered the fact that Walker is a nonemployee of the Respondent who is not a current union member, and had nothing obvious to gain by making untrue accusations against the Respondent, while Ray is a management official with an interest in the outcome of this proceeding. However, Ray's testimony on this point was clear, certain, and facially plausible. I found it less plausible that Ray would, as Walker claimed, divulge an unlawful plan to "boot" the Union to an individual who he did not know and who had previously worked as a member of the Union. In addition, Ray's account is more consistent with other evidence. For example, Walker stated that he did not pursue employment with the Respondent because he did not want to cross a picket line, but in his account Ray did not advise Walker that it would be necessary to cross a picket line or defy a strike, whereas in Ray's account Ray discussed working during a strike by the union employees. In addition, according to Walker, Ray's plan included "see[ing] how fast we can replace our drivers," but the record shows that the Respondent continued to offer employment to all the union employees and promptly accepted the striking employees' offer to return to work. I was left with the impression that Walker's account, while not intentionally misleading, was also not carefully remembered, and was in general a bit pat. For these reasons, I found Ray's account more credible than Walker's.

May 28 Session

The parties met on May 28 at the Union's offices. Ray, Hall, and M. McKeever attended for the Respondent. This time only Gerdes and Garn attended for the Union because the Respondent had assigned work to Bryan and Fisher that precluded their attendance. At the meeting, the Respondent's negotiators presented proposal A and proposal B to the Union. The Union negotiators had not been shown either proposal previously. Proposal A generally preserved the unit employees' current wage rate at \$20.82 per hour, but did not provide any wage increases during the term of the contract, and created a \$16-per-hour wage rate for "inexperienced" drivers. In addition, proposal A slashed a wide array of employee benefits. Under the last contract, unit employees had 8 paid holidays and between 7 and 18 days of paid vacation annually, but under proposal A the Respondent would completely eliminate all holiday and vacation pay for the unit employees. In addition, under proposal A, the Respondent would end the employer's obligation to contribute to the unit employees' retirement fund. This was a reduction not only from the \$75 per week/per employee contribution that the unit employees were entitled to under the old contract, but also a reduction from the Respondent's May 19 proposal to make contributions of \$1.50 to \$60 per week/per employee. In addition to these cuts, proposal A included nearly all

² Gerdes had previously told the Respondent that he could not meet on May 25, 26, and 27. At trial, Gerdes stated that due to a change in his schedule he became available on those dates, but he did not recall informing the Respondent of that availability.

the reductions in benefits and other changes that the Respondent proposed on May 19, including the limitations on overtime pay discussed above.

The Respondent's proposal B, on the other hand, reduced the pay of incumbent unit employees from \$20.82 per hour to \$18 per hour, but preserved more of their benefits. Under this proposal the unit employees would continue to receive holiday pay, although the number of paid holidays would be reduced from eight to seven. The unit employees would have a vacation benefit, but the maximum number of paid vacation days one could earn was reduced by 2 to 3 days annually depending on the employees' years of service. Proposal B also included essentially all of the other benefit reductions and changes that the Respondent proposed on May 19.

The Respondent told the Union that the parties could talk about either proposal individually, but could not mix-and-match elements from the two proposals to create a new proposal. Gerdes asked if this was the Company's last, best, and final offer, and the Respondent's negotiators answered "no."

Gerdes then asked if the Respondent would agree to extend the existing contract for 1 week to give the Union an opportunity to review the two proposals, determine their dollar cost, and assess how each option would affect unit employees. The May 28 meeting took place on a Friday, and the existing contract was set to expire at midnight the following Monday, May 31. The Respondent refused Gerdes' request for an extension. When the Respondent did this, Gerdes became agitated and told the Respondent's negotiators to leave the Union's offices. He stated that the Company had been mismanaged, that "negotiations were over," and that he was "probably going to put [the Company] out of business." The Respondent's negotiators left at that time. There have been no further negotiations between the Respondent and the Union.

Ray, the only member of the Respondent's bargaining team who was called as a witness, testified, credibly in my view, that he had not bargained with no intention of reaching an agreement. He stated that on May 28 he intended to discuss how the Respondent had arrived at proposal A and proposal B, but that he did not have the opportunity to do so before Gerdes ended the meeting. Gerdes testified credibly, that when he said that "negotiations were over," what he meant (but did not say), was that negotiations were "over for that day." Since May 28, neither party has contacted the other to schedule further negotiations. However, Gerdes testified that he filed the unfair labor practices charges against the Respondent in hopes of forcing the Company to return to the bargaining table.

May 31 Union Meeting

On May 31, Gerdes and two other union officers met with the unit employees at the Union's facilities to discuss the Respondent's proposals. Approximately 21 of the 23 unit members were present. Gerdes discussed the Respondent's two proposals, and indicated that he considered them both completely unsatisfactory. He said, "I see no need to vote for this because there is no way that we are going to accept either one." Then he asked "Is there any objection to that?" No one objected, and the unit members did not vote on proposal A or

proposal B. Two drivers asked if the Union could continue negotiations, but the record does not show how Gerdes responded. Gerdes stated that he had authority to initiate a strike pursuant to the strike vote that the unit members had taken before the start of negotiations.³

E. Unilateral Changes and Initiation of Strike

By May 31, the Respondent had decided to unilaterally change the health insurance it was providing to the unit employees. In a letter prepared by Ray and signed by J. McKeever on May 31, the Respondent informed its insurance agent of the Respondent's decision to cease providing unit employees with the insurance plan described in the collective-bargaining agreement and instead offer them participation in the two health insurance plans that were available to the Company's nonunit employees. The letter stated that from June 1 to 16 the unit employees would have the opportunity to choose to enroll one of the two plans, and that any unit employee who did not enroll during that time would forgo Respondent-provided health insurance entirely.

On June 1, the Respondent transmitted a letter directly to each unit employee. The letter stated that the Company no longer recognized the Union as the employees' collective-bargaining representative and advised the employees that "the terms and conditions of your employment will be explained to you when you report." The letter to employees also stated that the health insurance which the Respondent had been providing pursuant to the collective-bargaining agreement "terminated May 31st, 2010" and that as of June 1 employees were eligible to participate in other health insurance plans offered by the Respondent. The Respondent did not send a copy of this letter to the Union, discuss its contents with the Union, or give the Union advance notice that it would be sending the letter. Ray testified that his belief was that since the contract had expired he "shouldn't have to recognize the Union" any longer.

Effective June 1, the Respondent unilaterally changed the unit employees' terms and conditions of employment to essentially those set forth in the Company's proposal B from May 28. These changes included: a reduction in wage rate from \$20.82 per hour to \$18 per hour for the current drivers, the limitation of overtime pay to only time worked in excess of 40 hours a week (eliminating entitlement to such pay based on time worked in excess of 8 hours on a particular day and on time worked before 6 am or after 5 pm), and the elimination of the Respondent's obligation to contribute to the retirement fund. The Respondent also discontinued the health insurance provided under the last collective-bargaining agreement, but later in June the Respondent reinstated that insurance retroac-

³ I do not credit Bryan's testimony that Gerdes stated that if a unit employee crossed the picket line that employee would no longer be able to drive a ready-mix truck in northeast Indiana. Tr. 127. Bryan, a driver who resigned his union membership and crossed the picket line during the strike, was palpably hostile to the Union and I believe he allowed that hostility to color his testimony. His testimony on this point was contradicted by Fisher, another of the Respondent's witnesses, who testified that nothing was said at the May 31 meeting about employees suffering consequences if they did not honor the strike. Tr. 193.

tive to June 1 out of concern that the Company might ultimately be ordered to reimburse the unit employees' uninsured medical costs.

On June 1, the unit employees initiated a strike against the Respondent and began picketing at two of the Respondent's facilities. At the time the strike began, the unit employees had not yet received the June 1 letter from Ray or been informed that the Respondent was changing their terms and conditions of employment. All of the Respondent's drivers initially honored the strike, but 5 of the 23 unit members eventually chose to resign their union memberships and return to work while the strike continued.⁴ The Union began the strike because the employees had no contract as of June 1, 2010. After the unit employees were informed that the Respondent was ceasing to recognize the Union and was making changes to their terms of employment, the Union filed the initial charge in this case on June 2, and that same day the Union changed its picket signs to accuse the Company of unfair labor practices.

On about June 9, the Respondent sent another letter directly to the unit employees. The Respondent did not provide the Union with any notice regarding this letter or its contents. The letter reiterated that the unit employees' old health insurance terminated on May 31, 2010, and advised employees that they would have to enroll by June 16 if they wanted to be covered by one of the Respondent's remaining health insurance plans. The Respondent also denied rumors that it was attempting to access moneys already in the employees' retirement fund for the Company's own purposes. On about June 25, the Respondent sent a third letter directly to the unit employees—again without providing a copy or notice to the Union. This letter informed employees that the Company was retroactively reinstating the unit employees' old health insurance plan.

By letter dated July 14, 2010, and delivered to the Respondent by facsimile that evening, the Union made an unconditional offer to return to work and end the strike. The Respondent answered the Union by letter dated July 16, stating that employees could return to work on Monday, July 19, 2010. This letter was the first communication that the Respondent had made to the Union since May 28, and the Respondent began the letter by reiterating its position that the Company did not recognize the Union as the bargaining representative of unit employees. Since June 1, the Respondent has never changed its position that it does not recognize the Union as the collective-bargaining representative of unit employees.

F. Complaint Allegations

The complaint alleges that the Respondent has failed to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act: since about January 26, 2010, by unilaterally changing employee pension benefits; by taking various steps to remove the Union and replace bargaining unit employees; on about June 1, 2010, by withdrawing recognition from the Union; on about June 1, 2010, when Ray, by letter, bypassed the Union and dealt directly with employees by informing them

that they could return to work and discuss new terms and conditions of employment; since about June 1, 2010, by unilaterally reducing employee wage rates and overtime benefits, and unilaterally changing employee health insurance benefits.⁵ The complaint further alleges that the Respondent interfered with employees' exercise of rights guaranteed under the Act in violation of Section 8(a)(1): on about May 27, 2010, by telling applicants for employment that it was going to remove the Union as the unit employees' collective-bargaining representative and quickly replace the bargaining unit employees; and, on about June 1, 2010, by announcing in a letter to employees that it was withdrawing its recognition from the Union and changing unit employees' terms and conditions of employment.⁶

III. DISCUSSION

A. Respondent's Obligation to Bargain.

The Board has held that when parties have a Section 9 bargaining relationship, the employer's obligation to refrain from making unilateral changes regarding mandatory subjects absent an overall impasse in bargaining survives the expiration of the contract, *Engineered Steel Concepts*, 352 NLRB 589, 606 (2008), *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005), *Made 4 Film, Inc.*, 337 NLRB 1152 (2002), as does the presumption that the Section 9 representative continues to represent the unit employees. *Lee Lumber & Building Material Corp.*, 322 NLRB 162, 176–177 (1996), *affd.* in relevant part and remanded, 117 F.3d 1454 (D.C. Cir. 1997). The Respondent contends that it was not required to meet these bargaining obligations because the parties did not have a Section 9 bargaining relationship based on the employees' majority support for the Union, but rather had the more limited type of bargaining relationship that is conferred by Section 8(f) of the Act when an employer in the construction industry enters into a pre-hire agreement with a union.⁷ The Board has held that when the parties' bargaining relationship is governed by Section 8(f), either party is free to repudiate the collective-bargaining relationship and decline to negotiate or adopt a successor agreement once the contract expires. *Oklahoma Fixture Co.*, 333 NLRB 804, 807 (2001), *enf. denied*, 74 Fed. Appx. 31 (10th Cir. 2003); *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843

⁵ In its brief, the General Counsel states that “[t]he evidence adduced at trial demonstrated that while Respondent announced to employees that it was changing their health insurance benefits, it did not actually do so.” Brief of General Counsel at p. 21, fn.9. The General Counsel abandons its allegation of a violation of Sec. 8(a)(5) based on a change to health insurance benefits, and I make no finding based on that allegation.

⁶ The complaint also alleges that the strike that the unit employees engaged in from June 1 to mid July 2010 was caused, and prolonged, by the Respondent's unfair labor practices. The Respondent's denies that allegation. A resolution of this issue, however, is not necessary either to determine whether the Respondent committed any of the violations alleged in the complaint, or to decide whether to order the relief sought by the General Counsel.

⁷ The Respondent does not contend that the parties were at a valid impasse in June 2010 when it unilaterally implemented new terms and conditions of employment for unit employees.

⁴ These individuals would have been subject to union fines if they had crossed the picket line without resigning their memberships.

F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). The General Counsel counters that the Respondent is not an employer in the construction industry and that its bargaining responsibilities are therefore the more extensive ones applicable under Section 9. For the reasons discussed below, I conclude that the General Counsel correctly characterizes the bargaining relationship as one existing under Section 9, and that the Respondent violated Section 8(a)(5) when it ceased to recognize the Union and unilaterally implemented changes to employees terms and conditions of employment.

Section 8(f) was added to the Act to “permit employers and labor organizations who are engaged in” construction, “an industry peculiarly marked by sporadic employment at locations that are continually changing to maintain some stability in their relationship by signing contracts before employees are hired,” even though the union cannot show at that time that it has majority status among the employees who will eventually be hired. *J. P. Sturrus Corp.*, 288 NLRB at 671–172; *John Deklewa & Sons*, supra. “[T]he threshold question in determining the applicability of Sec. 8(f) is whether the employer is engaged primarily in the building and construction industry.” *Engineered Steel Concepts*, 352 NLRB at 589 fn. 2.⁸ The Respondent cannot meet this threshold requirement because the Board has already held in *J. P. Sturrus Corp.*, supra, and *Mastronardi Mason Materials Co.*, 336 NLRB at 1306, that ready-mix delivery companies are not employers engaged in the building and construction industry for purposes of Section 8(f). Rather, such companies are suppliers to customers who may be engaged in the building and construction industry, not employers in that industry themselves. *J.P. Sturrus*, 288 NLRB at 671. As explained in *J. P. Sturrus*, the fact that a ready-mix concrete company “is a supplier to companies some of which may be deemed to be within the provisions of Section 8(f) . . . does not mean that [the ready-mix concrete company] is in the building and construction industry any more than a hardware store that furnishes hammers and nails to building contractors is engaged in the building and construction industry.” *Id.*

The Respondent, as the party seeking to avail itself of the Section 8(f) statutory exception bears the burden of establishing that it is an employer engaged primarily in the building and construction industry. *Engineered Steel Concepts*, 352 NLRB at 589 fn.2. In this case, the Respondent has failed to show facts that would justify treating it differently for purposes of Section 8(f) than ready-mix companies in general or the ready-mix companies involved in *J. P. Sturrus* and *Mastronardi* in particular. To the contrary, the credible testimony of the Respondent’s own witnesses was that the work performed by the Respondent is the same as that performed by other ready-mix companies. Moreover, to the extent that the decisions in *J. P.*

Sturrus and *Mastronardi* discuss the particular circumstances of the ready-mix delivery companies at issue there, those particulars also generally apply to the Respondent and weigh against exempting the Respondent from the holdings of those cases. For example, the Respondent, like the employer in *J. P. Sturrus*, has long-term ready-mix drivers who may visit several different customers in the course of a workday to make deliveries but consistently return to the Respondent’s facilities. Although the work of the Respondent’s ready-mix drivers is somewhat seasonal, the contract entitles laid-off employees to recall based on seniority. There was no evidence that any of the contracts between the Respondent and the Union were “pre-hire” agreements entered into before employees were hired into the bargaining unit. The record shows, in fact, that the Respondent and the Union have entered into at least 4 consecutive 5-year contracts, without any lapse between those contracts. Furthermore, the contract between the Union and the Respondent allows new employees 30 days to join the union, rather than the 7 days permitted in contracts under Section 8(f) – a factor that was viewed in *Mastronardi* as supporting the conclusion that the contract, and the relationship between the parties, was governed by Section 9 rather than Section 8(f). 336 NLRB at 1306. The Respondent’s ready-mix drivers spend most of their time at the Respondent’s ready-mix production/loading facilities, and driving to and from customer’s jobsites. During the time they are at the customer’s jobsites, the drivers generally remain in their trucks except to hose off their equipment before returning to the Respondent’s facilities. Like the ready-mix drivers in *J. P. Sturrus*, the Respondent’s ready-mix drivers occasionally assist a customer by helping to finish the concrete or by using the truck’s hose to rinse off the customer’s tools, but also as in *J. P. Sturrus*, the customer does not pay the Respondent for this incidental assistance and the driver is not required to render it. As with the ready-mix companies at issue in *J. P. Sturrus* and *Mastronardi*, I conclude that the Respondent ready-mix company is a supplier of material to customers, some of whom may be in the construction industry, but that the Respondent is not itself in that industry.

The Respondent does not really attempt to distinguish the facts of this case from those in *J. P. Sturrus*, and does not even mention *Mastronardi*. Rather the Respondent relies on the argument that the Board decided *J.P. Sturrus* incorrectly, and that I should not follow that precedent in this case. Brief of Respondent at Pages 13 to 17. According to the Respondent, the Board itself essentially repudiated *J. P. Sturrus* in *Techno Construction Corp.*, 333 NLRB 75 (2001) and *Bell Energy Management Corp.*, 291 NLRB 168 (1988). This argument is frivolous. It is clear that the Board has continued to adhere to *J. P. Sturrus* subsequent to both *Bell Energy Management Corp.* and *Techno Construction*. More specifically, the Board issued its decision in *Mastronardi*, on December 18, 2001, approximately 11 months after the Board issued its decision in *Techno Construction* on January 23, 2001, and about 20 years after the Board issued its decision in *Bell Energy*. In *Mastronardi*, the Board affirmed the administrative law judge’s decision, which relied on *J. P. Sturrus* for the proposition that “ready-mix concrete delivery companies are not engaged in the building and construction industry.” 336 NLRB at 1306. The

⁸ In order for an employer and a union to lawfully enter into a bargaining relationship under Sec. 8(f) of the Act, three requirements must be met: (1) the bargaining agreement must be with an employer engaged primarily in the building and construction industry; (2) the bargaining agreement must be with a labor organization of which building and construction employees are members; and (3) the bargaining agreement must cover employees who are engaged in the building and construction industry. *Hudson River Aggregates, Inc.*, 246 NLRB 192, 199 (1979), enf. 639 F.2d 865 (2d Cir. 1981).

Respondent conveniently fails to mention the *Mastronardi* decision in its brief, much less explain how that decision can be squared with the argument that the Board has repudiated *J. P. Sturrus*. Even more recently, in *Engineered Steel Concepts*, the Board affirmed the administrative law judge's decision, which relied on both *J. P. Sturrus* and *Mastronardi* to hold that an employer who hauled steel byproducts between steel mills and delivered clay to a dam construction site was not engaged in the construction industry for purposes of Section 8(f). 352 NLRB at 602. The Respondent does not mention *Engineered Steel* much suggest a way to harmonize that decision with its argument that *J. P. Sturrus* and *Mastronardi* are no longer good law.⁹

Since the Board's decisions in *J. P. Sturrus* and *Mastronardi* are still good law regarding the status of ready-mix companies under Section 8(f), I am not free to consider the Respondent's arguments that the Board's decision in *J. P. Sturrus* was erroneous. Those arguments are not persuasive, but even if I thought they were, I would be bound to follow Board precedent on the subject. See *Comau, Inc.*, 356 NLRB No. 21, slip op. at 12 (2010); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199, 199 fn. 2 (1982), enf'd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enf'd. 640 F.2d 1017 (9th Cir. 1981).

The contract in this case was governed by Section 9 since the Respondent was not a construction industry employer and thus could not enter in an 8(f) relationship. *Engineered Steel Corp.*, 352 NLRB at 602. Therefore, the Respondent had a continuing obligation to recognize and bargain with the Union after the expiration date of the last collective-bargaining agreement and violated Section 8(a)(5) and (1) since about June 1, 2010 by: ceasing to recognize the Union, bypassing the Union and dealing directly with unit employees,¹⁰ and unilaterally changing the employees' terms and conditions of employment, including those relating to wage rates and overtime benefits. I also conclude that the Respondent violated Section 8(a)(1) when, on about June 1, 2010, Ray informed unit employees by letter that

⁹ At any rate, neither *Bell Energy* nor *Techno Bell* concerned a ready-mix delivery company and neither contained any discussion criticizing the Board's decision in *J. P. Sturrus*. In *Bell Energy* the Board does not even mention *J. P. Sturrus*. The employer involved was not a ready-mix company, but one that serviced, fabricated, and installed heating and air-conditioning units, and the Board held that the employer was not shown to be engaged in the building and construction industry. 291 NLRB at 169. The decision in *Techno Bell* held that an employer that built water and sewage systems was engaged in the building and construction industry for purposes of Sec. 8(f). That decision makes mention of *J. P. Sturrus* only as an example of a case in which an employer was not engaged in construction work for purposes of Sec. 8(f). 333 NLRB at 82.

¹⁰ See *Northwest Graphics, Inc.*, 343 NLRB 84, 93 (2004) ("It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1).")

the Company was withdrawing recognition from the Union and changing employees terms and conditions of employment since those statements had the effect of "undermining the Union's representative role." *Windsor Convalescent Center of North*, 351 NLRB 975, 987 (2007), enf. denied in part on other grounds sub nom. *S & F Market Street Healthcare LLC v. NLRB.*, 570 F.3d 354 (D.C. Cir. 2009).

I further find that the Respondent violated its bargaining obligation since about January 26, 2010, by unilaterally changing employee pension benefits. Beginning sometime in 2008, the Respondent ceased to make the retirement fund contributions required by the collective-bargaining agreement. On December 9, 2009, the Respondent notified the Union that it had failed to make retirement contributions in 2008 and on January 10, 2010, the Respondent advised the Union that the Respondent had failed to make required contributions for 2009. As of the time of the trial, the Respondent had not paid the back contributions or resumed making contributions. In June 2010, the Respondent announced that it was unilaterally terminating its obligation to make pension fund contributions going forward. In its brief, the General Counsel recognizes that the Respondent ceased making pension contributions earlier than the January 26, 2010, date set forth in the complaint, but notes that the January 26 date alleged is within 6 months "of the filing of the charge in Case 25-CA-31548 and therefore is within the 10(b) period of the Act."¹¹

The Respondent acknowledges that the company ceased to make contributions to the employees' retirement fund and that it notified the Union of this fact on January 20, 2010, but argues that this "did not constitute a change in the pension benefit plan." Brief of Respondent at page 34. I reject this argument. The Respondent did not bargain with the Union before changing the retirement benefit that employees were, in fact, receiving, and this is a violation of Section 8(a)(5) regardless of the Respondent's motivation and regardless of whether the Company announced it as a formal change. See *Castle Hill Health Center*, 355 NLRB No. 196, slip op. at 37-38 (2010); *Merrill & Ring, Inc.*, 262 NLRB 392, 394 (1982); *Gulf Coast Automotive Warehouse*, 256 NLRB 486, 488-489 (1981). Therefore, I find that the Respondent has violated Section 8(a)(5) since January 26, 2010, by unilaterally changing employees' pension benefits.

B. Bad-Faith Bargaining.

The complaint alleges that the Respondent, by its overall conduct, bargained in bad faith, and with the intent of removing the Union and bargaining unit employees when it: (1) bargained

¹¹ A 10(b) defense is a statute of limitation and not jurisdictional in nature. Therefore, it is an affirmative defense which must be pled and is waived if not timely raised. *R.G. Burns Electric*, 326 NLRB 440, 446 (1998); *Public Service Co.*, 312 NLRB 459, 461 (1993); *DTR Industries*, 311 NLRB 833 fn. 1 (1993), enf. denied on other grounds, 39 F.3d 106 (6th Cir. 1994). In its answer to the complaint, the Respondent includes a boilerplate defense that "The Consolidated Complaint and any recovery thereon should be barred in whole or in part as being untimely pursuant to Section 10(b) of the Act," but the Respondent did not mention that defense at trial or in its posttrial brief, and makes no argument that the allegation regarding pension fund contributions, or any other specific complaint allegation, is time-barred in whole or in part.

with no intention of reaching an agreement; (2) insisted on proposals that were predictably unacceptable to the Union; (3) just 3 days before the expiration of the prior collective-bargaining agreement, presented the Union with two alternative regressive wage and benefit proposals and stated that the various aspects of the proposals could not be mixed together; and, (4) refused to extend the expiring contract for 1 week to permit the Union time to review the Respondent's contract proposals.

Although, as discussed above, I find that the Respondent unlawfully withdrew recognition and made unilateral changes in June 2010, the record does not show that, during the brief period of negotiations prior to June, the Respondent bargained in bad faith or with the intention of removing the Union through the conduct alleged. As discussed above, I credit Ray's testimony that he did not bargain with no intention of reaching an agreement. Rather, based on the record as a whole, I conclude that the Respondent was having significant financial difficulties and reacted by seeking extreme concessions from the Union. Although it is not surprising that the Union refused to agree to the Respondent's concessionary proposals prior to June 1, the evidence does not show that the Respondent made the unattractive and/or regressive proposals in an effort to thwart agreement rather than for the purpose of reaching an agreement advantageous to the Company.

The Board has stated that "[r]egressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), enf. 26 Fed. Appx. 435 (6th Cir. 2001); see also *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987) (regressive bargaining tactics are "an indicium of bad-faith bargaining" where they are "designed to frustrate bargaining"). It is true that proposal A and proposal B, which the Respondent offered on May 28, were regressive as compared to what the Respondent offered on May 19—most notably in that the May 28 proposals eliminated the requirement that the Respondent contribute to an employee retirement fund and included significant reductions in wage rates and vacation/holiday benefits. However, the General Counsel has failed to show that this regressive movement was "designed to frustrate bargaining." Rather the record provides another, more likely, explanation for the regressive movement between May 19 and May 28. On May 25, Ray met with the Respondent's owners to find out what their bottom-line "number" was for labor costs. None of the owners had been attending the bargaining sessions and, as discussed above, Ray was not fully aware of the Respondent's financial situation. At the May 25 meeting, the owners described the full extent of the Respondent's financial difficulties to Ray. Then the owners concluded that they should seek to reduce the Respondent's hourly labor costs from \$43 per unit employee, to \$31 or \$32 per unit employee. Ray testified, credibly and without contradiction, that the regressive proposals presented on May 28 were the product of this meeting and reduced the Respondent's labor costs to about the \$31 level. It is true that the Respondent did not explain all of this to the Union on May 28,¹² but it is also true that

Gerdes' decision to abruptly terminate negotiations that day limited the Respondent's opportunity to do so. Indeed, Ray testified that he had every intention of explaining the basis for the Respondent's May 28 proposals and responding to Gerdes' question about the Respondent's "number," but was prevented from doing so by Gerdes' actions.

I note, moreover, that this is not an instance in which the parties were moving close to agreement and the Respondent pulled the rug out from under negotiations by making a regressive proposal. Rather, even before the Respondent made its May 28 regressive proposal the parties were far from agreement and in little, if any, danger of reaching a new contract before June 1. I conclude that the Respondent has shown that there was a lawful explanation for the regressive proposals of May 28 and that the record does not support finding that those proposals were designed to frustrate bargaining. Cf. *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001) ("Where the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining."), enf. 308 F.3d 859 (8th Cir. 2002).

I also conclude that bad-faith bargaining is not indicated by the statements that the Respondent made on May 28 about its proposals that day. As discussed above, when it presented proposals A and B, to the Union, the Respondent stated that the parties could negotiate over either proposal individually, but could not mix-and-match elements from the two proposals to create a new proposal. The Respondent stated that these proposals were not the Company's last, best, and final offer. I do not consider Respondent's statements at the bargaining table to be evidence of bad faith. The Respondent was essentially proposing two routes to an agreement—one under which wages would remain essentially unchanged but vacation and holiday benefits would be completely eliminated, and a second under which wages would be significantly reduced, but the vacation and holiday benefits would continue, albeit in somewhat diminished form. The Respondent stated that it would discuss changes to either proposal. The fact that the Respondent was unwilling to consider a mix-and-match counteroffer (e.g., one that would take the wage rates from proposal A and the benefits from proposal B) indicates a degree of rigidity, but not a level of rigidity that was incompatible with further good faith negotiations. At any rate, Gerdes, by abruptly breaking off negotiations without exploring possible compromise, precluded the Respondent's willingness to consider counteroffers from being tested and therefore from being found lacking. Cf. *Chicago Tribune Co.*, 304 NLRB 259, 260 (1991) (in evaluating the sufficiency of a respondent's bargaining efforts, the Board has considered whether the other party's bad-faith bargaining has created a situation in which the respondent's good faith could not be tested and, therefore, could not be found lacking); *Continental Nut Co.*, 195 NLRB 841, 858 (1972) (same). Similarly, the Respondent's refusal to agree to the Union's request to extend the existing contract, while indicative of hard bar-

¹² The record does show, however, that the Respondent informed the Union about the very substantial reductions in the Company's sales and

the need for cost cutting, and that Gerdes indicated during bargaining that he was aware of the trouble the Respondent was having with the bank that provided the Company's financing.

gaining, does not demonstrate bad-faith bargaining under Board law. See *Sanderson Farms, Inc.*, 271 NLRB 1477, 1478-79 (1984) (overruling the administrative law judges determination that the employer's refusal to agree to a contract extension showed bad-faith bargaining).

For the reasons discussed above, I recommend dismissal of the allegation that the Respondent failed to bargain in good faith and violated Section 8(a)(5) and (1) prior to June 1, 2010, by acting in furtherance of a plan to remove the Union and replace bargaining unit employees and/or by engaging in other conduct designed to frustrate bargaining.

C. Section 8(a)(1) and Ray's Statements to Applicants

The complaint alleges that the Respondent violated Section 8(a)(1) on or about May 27, 2010, when Ray, by telephone, told applicants that the Respondent was going to remove the Union as its employees' collective-bargaining representative and quickly replace its bargaining unit employees. Walker, an applicant for employment, testified that such statements had been made to him by Ray during a telephone interview close to the end of May. Ray testified that he did not make such statements to Walker or other applicants, but rather told applicants that the Union might engage in a strike and asked the applicants whether they would drive for the Respondent in the event of a strike. As discussed above, I credit Ray's version of this conversation. However, I conclude that even Ray's version of what he said to applicants constitutes a violation of Section 8(a)(1). In *Planned Building Services*, 347 NLRB 670, 677 (2006) the Board held that an employer violates Section 8(a)(1) by asking employees whether they would be willing to cross a picket line if hired. As noted in that case, the employee's willingness to cross a picket line is an "impermissible consideration for hiring, since it penalizes employees for their intention to engage in protected activities," and asking employees about their willingness to do so is coercive. *Id.* at 707-08; see also *Mammoth Coal Co.*, 354 NLRB No. 83, slip op. at 18 (2009), *Fremont Ford*, 289 NLRB 1290 fn. 6 (1988), and *Spencer Foods*, 268 NLRB 1483, 1503 (1984), *affd.* in relevant part sub nom. *Food & Commercial Workers Local 152 v. NLRB*, 768 F.2d 1463 (D.C. Cir. 1985). Such questioning of an applicant has been found to violate the Act even when the employer is interviewing applicants during negotiations with a union for the purpose of securing replacement workers who will be willing to work in the event the union goes on strike. See, e.g., *Smith's Complete Market*, 237 NLRB 1424, 1431 (1978).

I find that the Respondent violated Section 8(a)(1) of the Act in late May 2010, by interrogating an applicant for a bargaining unit position about his willingness to work in the event that the Union called a strike by the unit employees.¹³

¹³ Although I do not find that Ray made the specific statements that the complaint alleges he did during the late May telephone conversation with an applicant, I find a violation based on the remarks that Ray admitted to making during that conversation. The Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This is particularly true when the unlawful conduct is established by the testimonial admissions of the Respondent's own witness. *Letter Carriers Local 3825 (Postal Ser-*

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5).

3. The full-time and part-time ready-mix drivers employed by the Respondent at its facilities in Fort Wayne, Indiana, and Kendallville, Indiana, constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act.

4. At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit described in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9 of the Act.

5. The Respondent violated Section 8(a)(5) and (1) of the Act: since January 26, 2010, by unilaterally changing the pension benefits provided to unit employees; and, since about June 1, 2010, by ceasing to recognize the Union, dealing directly with unit employees, and unilaterally changing the unit employees' terms and conditions of employment, including those relating to wage rates and overtime benefits.

6. The Respondent violated Section 8(a)(1): in about late May 2010 by interrogating an applicant for a position as a ready-mix driver about his willingness to work in the event that the Union went on strike against the Respondent; and, on about June 1, 2010, when it informed unit employees that the Company was withdrawing recognition from the Union and unilaterally changing the unit employees' terms and conditions of employment.

7. The General Counsel has not shown that during the contract negotiations in May 2010 the Respondent bargained in bad faith, or with the purpose of removing the Union and replacing unit employees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be required to place in effect all terms and conditions of employment provided by the contract that was effective by its terms from June 1, 2005, through May 31, 2010, and maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. In addition, I recommend that the Respondent be ordered to make the Unit employees whole for any losses of wages, overtime pay and other benefits that they may have

vice), 333 NLRB 343, 343 fn. 3 (2001); *Meisner Electric*, 316 NLRB 597 (1995), *affd.* 83 F.3d 436 (11th Cir. 1996) (Table); *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). In the instant case, the violation that I find is closely related to the one alleged in the complaint—involving statements by the same Company official, during the same telephone conversation, arising from the same contract negotiations, and under the same section of the Act. The statements which give rise to the violation, are established by the testimonial admission of Ray, the Respondent's own witness and general manager. I conclude that this matter has been fully litigated, and that the Respondent violated Section 8(a)(1) when Ray interrogated Walker about his willingness to work even if the Union went on strike.

incurred as a result of the unilateral changes, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf.d. 444 F.2d 502 (6th Cir. 1971) plus interest, compounded daily, as computed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent should also be ordered to remit all payments it owes to the employees' retirement fund, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf.d. 661 F.2d 940 (9th Cir. 1981) (Table), including any additional amounts pursuant to *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn.6 (1979), plus interest, compounded daily, as computed in *Kentucky River Medical Center*, supra. In addition, the Respondent should be ordered to continue such contributions and otherwise honor the terms of the most recent collective-bargaining agreement until it negotiates in good faith with the Union to a new contract or a bona fide impasse. *Crest Beverage Co.*, 231 NLRB 116, 120 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹⁴

ORDER

The Respondent, Irving Ready-Mix, Inc. of Fort Wayne and Kendallville, Indiana, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with the Chauffeurs, Teamsters & Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters (the Union) as the exclusive Section 9 collective-bargaining representative of a unit of employees comprised of all full-time and part-time ready-mix drivers employed by the Respondent at its facilities in Fort Wayne, Indiana, and Kendallville, Indiana.

(b) Withdrawing recognition from the Union as the exclusive collective bargaining representative of the unit employees.

(c) Unilaterally changing unit employees' terms and conditions of employment, including wages rates, overtime pay policy, and pension benefits without giving the Union notice and an opportunity to bargain over those changes.

(d) Bypassing the Union and dealing directly with unit employees regarding terms and conditions of employment.

(e) Telling unit employees that it is no longer recognizing the Union as the collective-bargaining representative of unit employees and that it is changing unit employees' terms and conditions of employment.

(f) Interrogating applicants for bargaining unit positions about their willingness to work in the event of a strike by the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore, honor, and continue the terms and conditions of employment set forth in the contract with the Union that was

effective by its terms from June 1, 2005, through May 31, 2010, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

(b) Make whole the unit employees and former unit employees for any and all loss of wages, overtime pay and other benefits incurred as a result of the Respondent's unlawful unilateral changes, with interest compounded daily, as provided in the remedy section of this decision.

(c) Make all contributions, including any additional amounts due, that it was required to make to the employees' retirement fund, but which it has not made since January 26, 2010, with interest compounded daily, as provided in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Fort Wayne, Indiana, and Kendallville, Indiana, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region Twenty-Five, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2010.

Dated, Washington, D.C. December 17, 2010

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to recognize and bargain in good faith with the Chauffeurs, Teamsters & Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters (the Union) as the exclusive Section 9 collective-bargaining representative of our employees in the bargaining unit comprised of all full-time and part-time ready-mix drivers employed at our facilities in Fort Wayne, Indiana, and Kendallville, Indiana.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT unilaterally change unit employees' terms and conditions of employment without giving the Union notice and an opportunity to bargain over those changes.

WE WILL NOT bypass the Union and deal directly with unit employees regarding terms and conditions of employment.

WE WILL NOT announce to employees that we no longer recognize the Union as the collective-bargaining representative of unit employees and/or that we are changing unit employees' terms and conditions of employment without first notifying, and bargaining in good faith with, the Union.

WE WILL NOT interrogate applicants for bargaining unit positions about their willingness to work in the event of a strike by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore, honor, and continue the terms and conditions set forth in the contract with the Union that was effective by its terms from June 1, 2005, through May 31, 2010, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL make whole the unit employees and former unit employees for any and all loss of wages, overtime pay, and other benefits incurred as a result of our unlawful unilateral changes, with interest.

WE WILL make all contributions, including any additional amounts due, that we were required to make, but did not make since January 26, 2010, to the unit employees' retirement fund, with interest.

IRVING READY-MIX, INC.